

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
COMMONWEALTH OF KENTUCKY)	FCC File No. 0000832308
)	
For Private Fixed Microwave Service Station)	
And Request for Waiver of Section 101.81 of the)	
Commission's Rules)	

ORDER

Adopted: September 3, 2002

Released: September 5, 2002

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* The Commonwealth of Kentucky (Kentucky) operated fixed microwave service (FMS) Station WEE427, Hazard Post, Kentucky in the 2 GHz band and inadvertently allowed the license of the station to expire. On April 2, 2002, Kentucky filed an application for a new authorization to operate the subject station.¹ In connection with its application, Kentucky requests a waiver of Section 101.81 of the Commission's Rules, 47 C.F.R. § 101.81, that would otherwise result in the authorization of the station on a secondary basis. For the reasons set forth below, we deny Kentucky's Waiver Request.

2. *Background.* The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services.² To this end, the Commission has adopted certain transition rules.³ In doing so, the Commission balanced the needs of incumbent FMS licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees and the need to provide ET licensees with a stable environment in which to plan and implement new services.⁴ Additionally, in adopting the transition rules, the Commission sought to prevent ET licensees from bearing any additional costs of relocating FMS licensees.⁵ Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a certain length of time, by the end of which the incumbents are to relocate to other spectrum.⁶ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs

¹ FCC File No. 0000832308 (Application) and associated Waiver Request (Waiver Request).

² Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

³ See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public, and most conducive to the introduction of new services. *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁴ *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30.

⁵ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

⁶ 47 C.F.R. §§ 101.69(b), 101.79(a). See also *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

caused by the earlier relocation.⁷ In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.⁸ Most minor modifications of FMS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the ET licensee.⁹ The result is that while incumbent FMS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status.

3. Kentucky failed to file an application for renewal of its license for Station WEE427. Thus, the license expired by its terms on November 28, 1999. On April 2, 2002, Kentucky filed a new application for a new license for the subject station.¹⁰ Kentucky concurrently filed a request for waiver of the Commission rule that provides that new FMS stations in the 2 GHz band are authorized on a secondary basis to ET licenses.¹¹

4. *Discussion.* In this case, while the station at issue was originally authorized with primary status, Kentucky allowed its license to operate that station to expire. Kentucky requests a waiver of Section 101.81 of the Commission's rules so that its new license for the station can be accorded primary status. We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹² For the reasons set forth below, we conclude that grant of the requested waiver is not warranted under the circumstances presented.

5. Significantly, Kentucky fails to provide any explanation as to why the license was allowed to expire, other than to state that the license "was mistakenly not renewed at the appropriate time."¹³ Thus, it appears that the license expired as a result of Kentucky's negligent failure to renew it in a timely manner. Each licensee bears the exclusive responsibility for filing a timely renewal application.¹⁴ We have previously held that an inadvertent failure to renew a license in a timely manner does not constitute a unique or unusual circumstance that renders application of the 2 GHz band licensing rules inequitable, unduly burdensome, contrary to the public interest, or leaves the applicant with no

⁷ See 47 C.F.R. §§ 101.69(a), 101.71-101.77

⁸ 47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis, e.g., the new ET licensees, and they are not protected from interference from primary operations. *Cost Sharing and First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. *Id.*

⁹ 47 C.F.R. § 101.81.

¹⁰ Application.

¹¹ Waiver Request.

¹² 47 C.F.R. § 1.925(b)(3).

¹³ See Waiver Request at 1.

¹⁴ See Biennial Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 21 (1999); Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 n.41 (1991).

reasonable alternative.¹⁵ Thus, we find that Kentucky has failed to make a sufficient demonstration that grant of a waiver is warranted. Significantly, Kentucky fails to provide any reason concerning why a waiver grant is warranted under the circumstances presented. The Waiver Request contains a general statement that “these links provide critical communications service to the people of the Commonwealth of Kentucky,”¹⁶ without any further discussion. Such statement is an insufficient showing that a waiver is warranted.¹⁷ Thus, we find that Kentucky has failed to make a sufficient demonstration that grant of a waiver is warranted.

6. *Conclusion.* Based on the record in this proceeding, we conclude that Kentucky has failed to demonstrate that grant of a waiver of Section 101.81 of the Commission’s Rules is warranted under the circumstances presented. We therefore deny its request for a waiver of Section 101.81 of the Commission’s Rules.

7. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 101.69 of the Commission’s Rules, 47 C.F.R. §§ 1.925, 101.69, the Requests of Kentucky, filed April 2, 2002, IS DENIED.

8. IT IS FURTHERED ORDERED that application FCC File No. 0000832308 SHALL BE REFERRED to the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division for processing consistent with this *Order* and the applicable Commission Rules.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D’wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

¹⁵ See, e.g., County of King, *Order*, DA 02-2035, ¶ 5 (WTB PSPWD rel. Aug. 21, 2002) (*King County*) (citing County of Warren, *Order*, 16 FCC Rcd 20149, 20151 ¶ 5 (WTB PSPWD 2001); Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188, 190-91 ¶ 6 (WTB PSPWD 2001); Plumas-Sierra Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572, 5575 ¶ 9 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999)).

¹⁶ Waiver Request at 1.

¹⁷ *King County*, ¶ 5 (citing County of Stanislaus, *Order*, 16 FCC Rcd 21956, 21958 ¶ 5 (WTB PSPWD 2001)).